SUPREME COURT, U.S.
2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

RENO A & E,

Petitioner,

v.

EBERLE DESIGN, INC.,
ELECTRONIC DEVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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May 31, 2007

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QUESTION PRESENTED

When does the Federal Circuit apply its own law, versus regional circuit law, to procedural issues in patent cases?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
Reno A & E
Eberle Design, Inc.
Electronic Devices, Inc.

RULE 29.6 STATEMENT

Reno A & E has no parent or publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Reno A & E respectfully petitions for a writ of certiorari to review the opinion and judgment of the Federal Circuit.

OPINIONS BELOW

March 2, 2007 Order in the United States Court of Appeals for the Federal Circuit (Appendix A).

January 3, 2007 Order in the United States Court of Appeals for the Federal Circuit (Appendix B).

January 16, 2006 Order in the United States District Court District of Arizona (Appendix C).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), following the order denying rehearing or rehearing *en banc* entered by the Federal Circuit on March 2, 2007.

STATUTORY PROVISIONS INVOLVED

There are no applicable statutory provisions involved in this case.

STATEMENT OF THE CASE

I. The Federal Circuit's Decision To Apply Regional Circuit Law, Instead Of Federal Circuit Law, To The Procedural Issue In Reno A&E's Patent Case Is Contrary To Its Own Precedent; And The Federal Circuit's Failure To Consistently Apply Its Own Law To Procedural Issues In Patent Cases Raises An Important Federal Question

Petitioner Reno A&E ("Reno") respectively submits that the Federal Circuit has entered a decision in conflict with another decision of the same Court, and has left unsettled an important federal question related to when Federal Circuit law, versus regional circuit law, applies to procedural issues in patent cases. Under the instruction of *Biodex Corporation v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1991) and related cases, the Federal Circuit should have applied its own law in deciding the procedural issue of whether the Court should reach the merits of Reno's patent appeal even though Reno did not formally renew its motion for judgment as a matter of law at the close of all the evidence. The Federal Circuit fails to uniformly apply either Federal Circuit law or regional circuit law to procedural issues in patent cases, creating ambiguity on the important federal issue. As such, this Court should grant certiorari.

The district court's subject matter jurisdiction was based upon 28 U.S.C. §§ 1331 and 1338(a), and jurisdiction of the Court of Appeals for the Federal Circuit was based upon 28 U.S.C. § 1295(a)(1).

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision To Apply Ninth Circuit Law To The Procedural Issue In Reno's Patent Appeal Conflicts With Another Decision Of The Same Court

In *Biodex Corporation v. Loredan Biomedical, Inc.*, the Federal Circuit addressed in detail when it should apply its own law, instead of regional circuit law, to procedural issues. In that case, Biodex sued an alleged infringer of a patent for devices related to muscle rehabilitation. *Biodex*, 946 F.2d at 852. During trial, Biodex orally moved for judgment as a matter of law (JMOL) at the end of testimony, but the district court never ruled on the motion. *Id.* at 853. Biodex failed to make any post-verdict motions, either by renewing its motion for a directed verdict, moving for a new trial, or by moving for judgment *non obstante veredicto* (JNOV). *Id.* On appeal, Biodex contended that the verdicts of invalidity of one patent and non-infringement of the other were not supported by substantial evidence. *Id.* The alleged infringer argued that Biodex failed to preserve the issues for appellate review by failing to file a post-verdict motion in the district court. *Id.*

The *Biodex* Court held that Federal Circuit law applied to the issue of whether a post-verdict motion was a prerequisite to appellate review of the sufficiency of the evidence underlying a jury verdict. *Biodex*, 946 F.2d at 858-859. Relying largely on *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984), *overruled on other grounds by Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), the *Biodex* Court concluded that Federal Circuit law applied because "the issue at hand, albeit procedural, bears an essential relationship to matters committed to our exclusive control by statute, the appellate review of patent trials." *Id.* The Court reasoned that because 28 U.S.C. §§ 1295(a)(1) and

1338 expressly mandate that the Federal Circuit hear all appeals from a final decision of a district court relating to patents, a determination of the prerequisites to the appellate review of legal issues was committed to the law of the Federal Circuit. *Id.*

A. The Federal Circuit Should Have Applied Its Own Law To The Procedural Issue In Reno's Appeal Regarding Reviewability Of The Sufficiency Of Evidence

Similar to the facts in *Biodex*, the procedural issue in Reno's appeal was a determination of the prerequisites for appellate review of the sufficiency of evidence regarding an issue of patent law. Therefore, under *Biodex*, the Federal Circuit should have applied its own law to determine those prerequisites, given the essential relationship between the procedural issue and the patent law issues committed to the exclusive jurisdiction of the Federal Circuit by statute. *See Biodex*, 946 F.2d at 858-859; *see also Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003) (applying Federal Circuit law to question of whether a pre-verdict JMOL motion directed to inequitable conduct and the on-sale bar is sufficient to preserve the right to a post-verdict JMOL motion directed to obviousness).

B. Under Federal Circuit Law, Reno's Motion For Directed Verdict At The Close Of Its Opponent's Case Was Sufficient To Preserve For Appeal The Sufficiency Of Evidence Regarding The On-Sale Bar

Moreover, if the Federal Circuit had decided the issue under Federal Circuit law, it should have resulted in a different outcome. In *Duro-Last, Inc. v. Custom Seal, Inc.*, the Federal Circuit stated that "[a] liberal reading of [Rule 50] may be appropriate in some circumstances, such as when the

failure is largely a technical one, and no prejudice results[;][f]or example, courts may excuse a party's failure to comply with the technical requirements of Rule 50 if the party clearly challenged the sufficiency of the evidence on the disputed issue at *some point during trial*, thereby alerting the opposing party as to the grounds on which the evidence is allegedly insufficient." *Duro-Last*, 321 F.3d at 1106 (citing *Boynton v. TRW, Inc.*, 858 F.2d 1178, 1185-86 (6th Cir. 1988)). Therefore, the Federal Circuit characterized the requirement that a party move for directed verdict at the close of all evidence as "technical," and suggested that, like in *Boynton*, it would excuse a failure to comply with the technicality where the opposing party was alerted to the grounds for the insufficiency of evidence argument. *Id.*

The Federal Circuit's decision in Reno's case is contrary to its prior decisions in *Biodex* and *Duro-Last*. Therefore, Reno respectfully requests that this Court grant certiorari.

II. The Federal Circuit Has Not Consistently Ruled On The Issue Of When Federal Circuit Law, Versus Regional Circuit Law, Applies To Procedural Issues On Appeal In Patent Cases

Petitioner respectively submits that the issue of what law applies to procedural issues in patent cases is an important federal question because the Federal Circuit has not applied a uniform test or inquiry to determine the answer, and has not ruled consistently on the issue. *See Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1359 (Fed. Cir. 1999) (*en banc* in relevant part) (recognizing the difficulty in determining what law applies to procedural issues in patent cases under the tests set forth in precedent); *Biodex*, 946 F.2d at 855-856 (recognizing that the case law is unclear on whether the Federal Circuit should or must defer to the law of

the regional circuit on the issue of whether a party sufficiently moved under Rule 50(b) to preserve sufficiency of evidence arguments on appeal); *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1327 (Fed. Cir. 2003) (Dyk, J., concurring) ("At present, our jurisprudence on this question [about which law applies to the procedural issue] is at best confusing.")

The Federal Circuit has not ruled consistently on the issue of which law applies to procedural issues in patent cases. *Compare Biodex*, 946 F.2d at 858-859 (applying Federal Circuit law to determine the reviewability of the sufficiency of the evidence in a patent case where the party failed to make any post-verdict motions); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed. Cir. 1994) (applying Federal Circuit law to the question of whether the district court has personal jurisdiction over a patent defendant); *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1182 (Fed. Cir. 1996) (applying Federal Circuit law to the issue of whether a party in a patent case is a "prevailing party" for purposes of Rule 54(d) of the Federal Rules of Civil Procedure); *Hybritech Inc. v. Abbott La.*, 849 F.2d 1446, 1451 n. 12 (Fed. Cir. 1998) (applying Federal Circuit law to the issue of whether the plaintiff met requirements to a preliminary injunction in a patent case); *Goodyear Tire & Rubber Co. v. Releaseomers, Inc.*, 824 F.2d 953, 954-955 n. 3 (Fed. Cir. 1987) (applying Federal Circuit law to the issue of whether a sufficient controversy exists to permit an action for declaratory judgment of patent non-infringement); *Gardco Mfg., Inc. v. Herst Lighting Co.*, 820 F.2d 1209, 1212 (Fed. Cir. 1987) (applying Federal Circuit law to the issue of whether a patentee was entitled to jury trial on the issue of inequitable conduct); *Truswal Sys., Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1212 (Fed. Cir. 1987) (applying Federal Circuit law to the issue of whether materials were relevant for purposes of discovery in a patent

case under Fed. R. Civ. P. 26); *Tex. Instruments Inc., v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1566 n. 6 (Fed. Cir. 1996) (applying Federal Circuit law to the issue of whether a pre-verdict JMOL motion on infringement is sufficient to support a post-verdict JMOL motion on infringement under the doctrine of equivalents), with *Eberle Design Inc. v. Reno A&E*, United States District Court, District of Arizona Case No. 2:02-cv-2575 (case below) (applying Ninth Circuit law to the issue of whether the Court may review on appeal the sufficiency of the evidence in a patent case); *Vardon Golf Company, Inc. v. Karsten Manufacturing Corp.*, 294 F.3d 1330, 1333 (Fed. Cir. 2002) (applying Seventh Circuit law to the application of collateral estoppel in a patent case); *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1323 (Fed. Cir. 2003) (same); *Delta-X Corp. v. Baker Hughes Production Tools, Inc.*, 984 F.2d 410, 412 (Fed. Cir. 1993) (applying Fifth Circuit law to determine the import of the failure to move for a directed verdict in a patent case); *Zodiac Pool Care, Inc. v. Hoffinger Industries, Inc.*, 206 F.3d 1408, 1416 (Fed. Cir. 2000) (deferring to Eleventh Circuit law on the issue of whether failure to renew JMOL at the close of all evidence in a patent case acted as a waiver to the sufficiency of the evidence argument on appeal); *Wilson Sporting Goods Company v. David Geoffrey & Assocs.*, 904 F.2d 677, 683 (Fed. Cir. 1990), *overruled in part on other grounds by Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83 (1993) (deferring to Fourth Circuit law in determining whether a directed verdict motion was sufficiently specific to preserve for appeal a JNOV motion).

A. The Federal Circuit's Failure To Apply A Uniform Test To Determine What Law Applies To Procedural Issues On Appeal In Patent Cases Raises An Important Federal Question

The *Biodex* Court reviewed the various tests and inquiries used by the Federal Circuit to determine when deference to regional circuit law regarding procedural issues is appropriate. *Biodex*, 946 F.2d at 855-858. The Court recognized that the initial inquiry used by the Federal Circuit in determining whether deference to regional circuit law was due, was to decide whether the law that must be applied, whether procedural or substantive, was one "... over which this court does not have exclusive appellate jurisdiction." *Id.* at 855-856 (citing *Cicena Ltd. v. Columbia Telecommunications Group*, 900 F.2d 1546, 1548 (Fed. Cir. 1990)). "This test has been variously and inconstantly phrased, including determining whether the issue concerns a "subject which is not unique to patent law," or which is "not specific to our statutory jurisdiction." *Id.* at 856 (citing *Kalman v. The Berlyn Corp.*, 914 F.2d 1473, 1480 (Fed. Cir. 1990) and *Registration Control Sys. v. Compusystems, Inc.*, 922 F.2d 805, 807 (Fed. Cir. 1990)).

The *Biodex* Court recognized that as an alternative, the Federal Circuit on occasion looked to whether the procedural issue may be "related" to "substantive matters unique to the Federal Circuit" and thus committed to Federal Circuit law. *Id.* (internal quotations omitted) (citing *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990)). But that test does not end the inquiry, the *Biodex* Court concluded. *Id.* at 857. Secondarily, the Federal Circuit has considered "whether most cases involving the issue will come on appeal to this court thereby putting us in a good position to create a uniform body of federal law on the

issue." *Id.* (internal quotations omitted) (citing *Forman v. United States*, 767 F.2d 875, 880 n. 6 (Fed. Cir. 1985)).

Finally, the *Biodex* Court affirmed that the Federal Circuit generally conformed to the law of the regional circuits, without regard to the relationship of the issue to the Federal Circuit's exclusive jurisdiction, when there is existing and expressed uniformity among the circuits. *Id.*

Concluding that none of the various tests applied by the Federal Circuit made it clear what law should apply to the procedural question before it, the *Biodex* Court went on to examine the origins of the rule of deference. *Id.* The Court first noted *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984) (*en banc*). In *Atari*, the Federal Circuit explained that the concept of applying regional circuit law to nonpatent issues is based "more on systemic practicality than on judicial humility." *Atari*, 747 F.2d at 1440. The *Biodex* Court then studied *Panduit Corp. v. All States Plastic Mfg. Co.*, a case in which the Federal Circuit stated that the resolution of the issue of deference in particular cases would depend on whether the procedural matter should "pertain to" or be "related to patent issues, [such that] they have a direct bearing on the outcome." *Biodex*, 946 F.2d at 857 (internal quotations omitted) (quoting *Panduit*, 744 F.2d 1574-75 n. 14). Recognizing that *Panduit* does not require the Federal Circuit to defer the resolution of all procedural issues merely because that issue might separately arise in a case having nothing to do with patent law, the *Biodex* Court examined cases where the Federal Circuit did not defer to regional circuit law when deciding such procedural issues. *Id.* at 858.

In *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, the Court was confronted with the applicable standard for the issuance of a preliminary injunction, a procedural

issue not necessarily limited to patent law, and determined that Federal Circuit law should apply because the question on appeal involved patent law, substantive law unique to the Federal Circuit. *Chrysler*, 908 F.2d at 953. The *Chrysler* Court stated that "when the question on appeal is one involving substantive matters unique to the Federal Circuit, . . . we apply to related procedural issues the law of this circuit." *Id.*

Similarly, in *Sun-Tek Indus. Inc. v. Kennedy Sky Lites, Inc.*, 856 F.2d 173 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989), the Court was confronted with the procedural issue of whether an order increasing a supersedeas bond was a final appealable order. *Id.* at 175-176. Although the procedural issue is not confined to patent law, the Court declined to defer because the issue directly related to the Federal Circuit's appellate jurisdiction. *Id.*

Relying on *Panduit* and its progeny, the *Biodex* Court concluded that the issue before it – reviewability on appeal of the sufficiency of the evidence in a patent trial absent any post-verdict motions - was an essential matter committed to the Federal Circuit's exclusive control over patent appeals. *Biodex*, 946 F.2d at 858-859.

Following *Biodex*, the Federal Circuit in *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (*en banc* in relevant part) articulated a slightly different approach to the deference issue when it examined what law should apply to a preemption question in a patent case, noting that "it has not been obvious whether a particular issue should be characterized as a 'patent' issue or not." *Id.* at 1359. After analyzing two cases addressing the issue of deference, *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568 (Fed. Cir. 1996), and

Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998), *cert. denied,* 525 U.S. 876 (1998), the *Midwest Industries* Court concluded that:

> [T]he rigid division between substantive patent law issues and all other substantive and procedural issues, which was the basis for the court's choice-of-law ruling in [previous cases], no longer represents this court's approach to choice-of-law questions in patent cases[;] [r]ather, cases such as *Pro-Mold* and *Nobelpharma* make clear that our responsibility as the tribunal having sole appellate responsibility for the development of patent law requires that we do more than simply apply our law to questions of substantive patent law.

Id. at 1360.

Recognizing that no clear line of demarcation for deference exists, the *Midwest* Court held that it was its responsibility to apply Federal Circuit law to issues of preemption in order to avoid "the awkward posture of holding that, with respect to cases coming to us from district courts in some circuits, patent law forecloses certain other causes of action, but with respect to cases coming to us from district courts in other circuits, it does not." *Id.* In so ruling, the *en banc* Court in *Midwest Industries* concluded that by applying Federal Circuit law to the preemption issue, it was promoting uniformity in the law with regard to subject matter within its exclusive appellate jurisdiction. *Id.* at 1360-1361.

B. This Court Should Promote Uniformity In The Law By Determining That Federal Circuit Law Applies To Procedural Issues In Patent Cases

This Court should grant certiorari to decide that Federal Circuit law applies to a determination of whether a Rule 50 motion is sufficient to preserve for appeal a review of the sufficiency of the evidence. Such a ruling would promote uniformity in the law by avoiding the awkward situation that now exists - the Federal Circuit may review on appeal the sufficiency of the evidence in a patent case following a party's failure to strictly comply with Rule 50, if the appeal comes from a district court in a circuit that applies Rule 50 liberally, but not if the appeal comes from a district court in a circuit that applies Rule 50 strictly. This Court should take this opportunity to promote uniformity in the law and dispel the awkward conundrum that now exists.

CONCLUSION

Because the Federal Circuit's decision in Reno's appeal is contrary to its precedent, and because the Federal Circuit fails to consistently apply its own law to procedural issues in patent cases, the Petitioner respectfully submits that this Court should grant certiorari to address the conflict and ambiguity raised by the Federal Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 2006-1236, 2006-1247

[Filed March 2, 2007]

EBERLE DESIGN, INC.,
Plaintiff/Counterclaim Defendant-Cross Appellant,

and

ELECTRONIC DEVICES, INC.,
Counterclaim Defendant-Cross Appellant,

v.

RENO A & E,
Defendant/Counterclaimant-Appellant.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 9, 2007.

FOR THE COURT,

/s/_____
Jan Horbaly
Clerk

Dated: 03/02/2007

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 2006-1236, 2006-1247

[Filed January 23, 2007]

EBERLE DESIGN, INC.,
Plaintiff/Counterclaim Defendant-Cross Appellant,

and

ELECTRONIC DEVICES, INC.,
Counterclaim Defendant-Cross Appellant,

v.

RENO A & E,
Defendant/Counterclaimant-Appellant.

Before BRYSON, GAJARSA, and DYK, Circuit Judges.

ORDER

The judgment of the district court is affirmed. Appellant Reno A & E did not move for judgment as a matter of law at the close of all the evidence and thus failed, under then-applicable principles of Ninth Circuit law, to preserve its right to challenge the sufficiency of the evidence on appeal. *See*

Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 886-87 (9th Cir. 2002). Although Reno timely moved for a new trial, the district court did not abuse its discretion in denying that motion because the trial court did not commit legal error when instructing the jury or in its consideration of the new trial motion, and because Reno has failed to show that the record contains no evidence to support the verdict. *See Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987).

We dismiss the conditional cross-appeal as improperly taken, because the cross-appeal, if successful, would not expand the scope of the judgment in the cross-appellants' favor. *See Mass. Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1347-48 (Fed. Cir. 2006).

FOR THE COURT

JAN 23 2007
Date

/s/
Jan Horbaly
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. 2:02-cv-2575

[Filed January 16, 2006]

EBERLE DESIGN INC.,
Plaintiff, Counter Defendant,

v.

RENO A&E,
Defendant, Counter Claimant,

v.

ELECTRONIC DEVICES INC.,
Counter Defendant.

ORDER

The Court concludes that (1) Reno is not entitled to JMOL on the issue of invalidity because Eberle presented evidence from which a reasonable jury could conclude that the requirements of the on-sale bar were satisfied by clear and convincing evidence; (2) Given this ruling, Reno is not entitled to JMOL on infringement; (3) Reno is not entitled to a new trial because (a) the jury's verdict was not against the

weight of the evidence or seriously erroneous and (b) the jury instructions' omission of the word "definite" was not legally erroneous and, if legally erroneous, did not have a prejudicial effect in light of the complete instructions and full trial record. Given these conclusions, the Court need not decide whether Reno is entitled to seek a post-trial JMOL under Rule 50(b) of the Federal Rules of Civil Procedures. The Court concludes that oral argument is not necessary.

/s/
Judge David G. Campbell

Dated: 1-16-06